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No. 99-916

IN THE

Supreme Court of the United States

ENRON POWER MARKETING, INC.,
Petitioner,

v.

NORTHERN STATES POWER COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND RESPONSE TO MOTION TO VACATE

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QUESTIONS PRESENTED

(1) Whether the Petition should be dismissed because Petitioner did not seek FERC rehearing of the Curtailment Orders and did not invoke the mandatory review procedures as required by Section 313 of the Federal Power Act ("FPA"), 16 U.S.C. § 825.

(2) Whether the "narrowly circumscribed factual circumstance" of the Eighth Circuit's decision constitutes an important federal question that warrants Supreme Court review.

(3) Whether the Petition should be dismissed because Petitioner is extrapolating narrow issues of Curtailment Order interpretation into an impermissible collateral attack on Order No. 888.

RULE 29.6 LISTING

Northern States Power Company (Minnesota) has no parent company and one non-wholly owned subsidiary:

Cogeneration Corporation of America, a partially-owned subsidiary of NRG Energy, Inc., which is in turn a wholly-owned subsidiary of Northern States Power Company (Minnesota).

Northern States Power Company (Wisconsin's) parent company is Northern States Power Company (Minnesota) and has no non-wholly owned subsidiaries.

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INTRODUCTION

The Petition by Enron Power Marketing, Inc. ("Enron") for review of the Eighth Circuit Court of Appeals' decision in *Northern States Power Company v. FERC*, 176 F.3d 1090 (8th Cir. 1999) (Petitioner's Appendix ("App.") 1a - 11a) (hereinafter "*NSP*") should be denied. The Eighth Circuit opinion reversed and remanded three administrative Orders (collectively the "Curtailment Orders") (App. 12a-35a, 36a-41a, 42a-43a) [1] that

[1] The Curtailment Orders issued by the Federal Energy Regulatory Commission ("FERC") can be found at: 83 FERC ¶ 61,098 (April 30, 1998); order on request for clarification, 83 FERC ¶ 61,338 (June 29,

required Respondents (hereinafter "NSP") to *interrupt* electric service to its captive retail customers. In response to NSP's request for clarification, the Curtailment Orders subjected "bundled"[2] retail service to pro rata transmission interruption (*i.e.* load shedding) when NSP *curtails* service to "unbundled" point-to-point transmission customers who have alternate supply options.[3] The Eighth Circuit held that FERC lacks authority to compel retail load shedding in such circumstances.

Supreme Court review is unwarranted because Enron now seeks to resolve issues that do not arise out of the decision below. Moreover, the Eighth Circuit properly applied the relevant administrative and jurisdictional precedents, including FERC's Order No. 888,[4] to what FERC itself

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1998); and order denying requests for clarification, reh'g, and stay, 84 FERC ¶ 61,128 (July 31, 1998).

[2] Bundled service is the provision of electricity to customers who obtain their full energy requirements from their local utility. The power is sold, transmitted and delivered at retail to captive customers at regulated rates that are designed to recover the cost of service plus a prescribed return on investment.

[3] Firm point-to-point wholesale customers reserve interstate transmission capacity to transport electricity. These customers, primarily other utilities and power marketers like Enron, resell that energy for a profit. Generally such unbundled customers have alternate procurement options (production from their own power plants for example) if electricity cannot be delivered over a specific transmission line. *NSP*, 176 F.3d at 1093.

[4] Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, 61 Fed. Reg. 21,540 (May 10, 1996), FERC Stats. & Regs. [Regs. Preambles 1991-1996] ¶ 31,036 (1996), clarified, 76 FERC ¶ 61,009 and 76 FERC ¶ 61,347 (1996) order on reh'g, Order No. 888-A, 62 Fed. Reg. 12, 274 (Mar. 14, 1997), III FERC Stats. & Regs. ¶ 31,048 (1997), order on reh'g Order No. 888-B, 81 FERC ¶ 61,248 (1997), order on reh'g, Order No. 888-C, 82 FERC ¶ 61,046 (1998), appeals pending sub nom. Transmission Access Policy Study Group v. FERC (D.C. Cir. No. 97-1715)(Oral Argument, Nov. 3, 1999).

described on remand as the "narrowly circumscribed factual circumstance" (App. p. 47a) of this case. Further, since the Curtailment Orders were issued, FERC refined the procedures for alleviating transmission capacity congestion which necessitates curtailments. These new "rules of the road" materially reduce the likelihood that the "narrowly circumscribed factual circumstance" addressed by the Eighth Circuit could occur. Accordingly, on remand NSP withdrew the proposed tariff amendment that precipitated the Curtailment Orders and the initial dispute.

STATEMENT OF THE CASE

The facts and regulatory structure out of which the underlying dispute arose are complex. But once the complete procedural history is understood, the reasons for denying Enron's Petition and the accompanying *Motion for Leave to File Brief and Brief of the Electricity Consumers Resource Counsel, et al as Amici Curiae* (hereinafter the " Amici") become clear.[5] The starting point is the Eighth Circuit's description of the case, which NSP adopts.

A. The Open Transmission Access Initiative.

NSP sells point-to-point transmission service to wholesale customers pursuant to a FERC-approved Open Access Transmission Tariff (the "Transmission Tariff"). The Transmission Tariff is on file at FERC pursuant to the FPA and Order No. 888. FERC regulates wholesale utility services such as point-to-point transmissions.[6] In this capacity FERC

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[5] On December 23, 1999, NSP received Enron's Memorandum Suggesting Mootness and Motion to Vacate. That Motion adds nothing new for the Court's consideration. NSP will not waste the Court's time with a separate, duplicative response as the analysis in this Brief already disposes of the issues raised in Enron's Motion. In short, Enron's Motion merely continues the impermissible collateral attack on Order No. 888.

[6] By contrast, as contemplated by the FPA, FERC Order No. 888, and years of judicial precedent, NSP's "bundled" retail service is conducted pursuant to retail NSP tarriffs on file with various State and Public utilities

promotes open access to the interstate transmission system in order to foster power supply competition. NSP strongly supports these pro-competitive policies. Like Enron, NSP sells wholesale power. This business benefits from "open access." The nondiscriminatory availability of transmission capacity enables NSP to market power at wholesale over a broad regional marketplace. The *quid pro quo* for access to the transmission grids of neighboring utilities is that NSP must offer comparable access to its proprietary transmission system.

Order No. 888 was promulgated to implement this "open access" policy. All owners of wholesale transmission facilities are required to provide service pursuant to Transmission Tariffs that contain terms identical to or superior to Order No. 888's published "pro forma" tariff. The same Transmission Tariff must be applicable to all wholesale electricity shipments. Simply put, a transmission system owner is prohibited from favoring its own wholesale transactions over the comparable wholesale transactions of a competitor. FERC exercises jurisdiction over all such jurisdictional wholesale transactions, and Order No. 888 establishes the regulatory framework under which the wholesale power marketing business is conducted. Essentially the nation's investor-owned electric transmission systems are treated like common carriers of wholesale power supply shipments. Enron and NSP's merchant function compete in this marketplace.

Contrary to Enron's mischaracterization, the Eighth Circuit's narrow decision does no violence to open transmission access. Order No. 888 clearly prevents NSP from discriminating against Enron's FERC-jurisdictional transactions in favor of NSP's own jurisdictional transactions. But Enron's Petition goes far beyond seeking comparable treatment; Enron wants a dramatic expansion of FERC jurisdiction beyond the bounds of Order No. 888.

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commissions. State law governs the "local distribution" of electricity, 16 U.S.C. § 824 (b)(1); *see NSP*, 176 F.3d at 1095.

In promulgating Order No. 888, FERC exercised its authority to ban discrimination in the wholesale power markets. FERC determined, however, that the Transmission Tariff would only apply to wholesale transactions and certain "unbundled" retail sales not relevant to this case. Order No. 888 expressly excluded the transmission component of bundled retail service from the Transmission Tariff's reach.

Enron fails to acknowledge that FERC considered the reservation of jurisdiction over retail sales contained in Section 201 of the FPA, (16 U.S.C. § 824(b)) and that FERC rejected Enron's more expansive electric transmission regulation based on the Natural Gas Act (15 U.S.C. §§ 717 *et seq.*) ("NGA") and cases thereunder. Indeed, FERC determined that

> when transmission is sold at retail as part and parcel of the delivered product called electric energy, the transaction is a sale of electric energy at retail. Under the FPA, the Commission's jurisdiction over sales of electric energy extends only to wholesale sales.

Order No. 888, FERC Stats. and Regs. at 31,781.

Thus by this Petition Enron seeks to establish exclusive federal authority over the transmission component of bundled retail electric service. The FPA and FERC's pronouncements in Order No. 888, do not authorize this position and Enron's arguments go well beyond the issues actually litigated below.

B. NSP's Transmission Tariff Revisions.

The pro forma tariff required by Order No. 888 provides for non-discriminatory curtailment of "point-to-point" transmission service during periods in which transmission congestion does not permit all firm transactions to continue simultaneously (*i.e.* when the physical capability of the lines and switching systems is potentially exceeded). In such circumstances "to the extent practicable and consistent with Good Utility Practice, the Transmission Provider will curtail

service to Network Customers and Transmission Customers taking Firm Point-to-Point Transmission Service on a basis comparable to the curtailment of service to the Transmission Provider's Native Load Customers." (Order No. 888-A, Pro Forma Tariff at § 13.6.) (App. 315a.) In February 1998, NSP proposed to revise this provision. NSP wanted to incorporate application of regional reliability procedures that, among other things, provide for pro rata curtailments of point-to-point transactions without requiring utilities to interrupt bundled retail service. (App. 319a.) In the Curtailment Orders, FERC rejected NSP's amendments and then purported to compel the shedding of native load bundled retail service under the Transmission Tariff even if the wholesale customer (typically another utility) has other supply options and will not be forced to interrupt its bundled retail customers.

C. The Eighth Circuit's Decision.

In a carefully circumscribed opinion, the Eighth Circuit found that the Curtailment Orders improperly regulate NSP's State-jurisdictional retail service. FERC was without FPA authority to mandate less reliable service to native load customers than the retail customers of firm wholesale transmission users with other supply alternatives. *NSP*, 176 F.3d at 1094-95, citing *Altamont Gas Transmission Co. v. FERC*, 92 F.3d 1239, 1248 (D.C. Cir. 1996), *cert. denied sub nom. Indicated Expansion Shippers v. FERC*, 117 S. Ct. 1568 (1997) (hereinafter "*Altamont*"). This is a narrow, not sweeping, appellate result. [7] And subsequent FERC proceedings have followed or implemented the Eighth Circuit's interpretation. Thus the underlying factual issue that

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[7] FERC, Enron and others (including the Amici) sought rehearing and suggested en banc consideration before the Eighth Circuit. Notably, the National Association of Regulatory Utility Commissioners ("NARUC"), the umbrella organization for State utility regulatory commissions, filed an Amicus brief in opposition to Enron's. On September 1, 1999, the Eighth Circuit denied rehearing and declined to consider the matter en banc.

gave rise to this case is no longer live. Enron's and the Amici's cries about detrimental impacts on interstate commerce and wholesale competition simply cannot be taken seriously.

D. Subsequent Events.

The Curtailment Orders were remanded for further proceedings. FERC's Order on Remand (App. 44a), and NSP's subsequent notice filing (App. 321a) both implemented the Eighth Circuit's decision in light of other FERC rulings on transmission congestion management. On December 20, 1999, FERC accepted NSP's notice filing. *In re Northern States Power Co.*, 89 FERC ¶61, 299 (Dec. 20, 1999) (Enron Motion Appendix 1.)

More importantly, as discussed by Enron and the Amici, after the NSP-specific Curtailment Orders were issued, FERC separately and extensively considered curtailment issues under Order No. 888. These "generic" proceedings - initiated June 5, 1998, when the North American Electric Reliability Council ("NERC") filed its "Transmission Loading Relief" ("TLR") procedures, resulted in a series of "generally applicable" rulings on regional transmission congestion management (the " TLR Orders").[8] The Eighth Circuit determined that retail customers should be protected from *load shedding* when economic dispatch transactions of point-to-point customers are *curtailed*. This ruling is fully consistent with a FERC ruling just two days before the Eighth Circuit's decision. The May 12, 1998 TLR Order concluded

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[8] *North American Elec. Reliability Council*, Docket No. EL98-52-000, "Notice of Filing and Notice Regarding Implementation of NERC Transmission Loading Relief Procedures," (June 12, 1998); *North American Elec. Reliability Council* , 85 FERC ¶61,353 (1998), *reh'g denied*, 87 FERC ¶61,161 (1999); *North American Elec. Reliability Council*, 86 FERC ¶61,275 (1999); *North American Elec. Reliability Council*, 87 FERC ¶61,160 (1999); *North American Elec. Reliability Council*, 88 FERC ¶61,046 *order accepting compliance filing*, 89 FERC ¶61,031 (1999).

that curtailment and load shedding do *not* create comparable operational impacts and that all available alternatives should be exhausted before resorting to load shedding to relieve a transmission overload condition. 87 FERC at ¶ 61,161.

REASONS FOR DENYING CERTIORARI

The subsequent administrative proceedings obviate the presence of any substantial federal question that could possibly justify Supreme Court review of this case. S. Ct. Rule 10. The highly technical implementation issues surrounding Order No. 888 should remain before the agency with the requisite expertise. As evidenced by the TLR Orders, FERC has been resolving any remaining issues through individual or "generic" transmission adjudication proceedings. This Court and transmission access policy would be best served by rejecting Enron's collateral attacks on Order No. 888 and allowing FERC to proceed in developing that policy at the agency level.

To attract this Court's attention, Enron and the Amici distort NSP's initial FERC filing, the proceedings on remand, the scope of the Eighth Circuit opinion, and the potential impact of the opinion on Order No. 888. The Transmission Tariff amendments NSP proposed in February 1998 were *not* intended to "give a preference, in any curtailment, to [NSP's] own retail customers," or to "degrade the firm service" sold to third parties like Enron. (Pet. p. 3, 4.) Moreover, the Eighth Circuit never questioned the validity of Order No. 888 as that administrative order was not up for review in this case. To the contrary, the appellate decision was confined to technical implementation issues arising from the Curtailment Orders. *NSP*, 176 F.3d at 1093.

At its most fundamental level, the decision below is fully consistent with FERC's recent curtailment pronouncements. The TLR Orders are the correct operational and legal approach to wholesale transmission management. FERC's emerging regulatory scheme preserves *both* non-discriminatory/comparable access that wholesale users like

Enron seek *and* resolves lawfully the retail reliability concerns which caused NSP to initiate this case. The Curtailment Orders were not consistent with the TLR Orders or the Order on Remand. As such, the Curtailment Orders were properly reversed and remanded for further agency consideration.

And that is exactly what happened. As a result of the Eighth Circuit's decision, the retail service interruption aspects Curtailment Orders are a dead letter; the TLR Orders announce FERC's current policy on curtailment procedures. There is nothing left to be done by this court, least of all entertain Enron's patent collateral attack on Order No. 888.

A. Enron's Issues Are Not Appropriate ly Before This Court.

Enron and the Amici simply regurgitate issues that the Eighth Circuit considered and rejected. More importantly, these same arguments were pressed in the Order No. 888 administrative proceedings. Order No. 888 cashiered Enron's expansive view of transmission regulation, and FERC has never importuned such an approach in this case. Moreover, despite Enron's entreaties, Order No. 888 is not before the Court. If Supreme Court review of Order No. 888 and the pro forma tariff becomes necessary, the rulemaking appeal, now pending before the D.C. Circuit in *Transmission Access Policy Study Group v. FERC* , (D.C. Cir. No. 97-1715) (Oral Argument held Nov. 3, 1999), and not this case, will provide the proper vehicle.

1. Standard of Review

Enron's Petition seeks answers to questions that are far broader and entirely distinct from what the Eighth Circuit addressed. Enron's query "[w]hether FERC has jurisdiction under the [FPA] to regulate *all* transmission of electricity in interstate commerce" or whether it may " requir[e] that *any* curtailment of firm transmission service to wholesale customers be proportional" (Pet. p. i)(emphasis added) collaterally attack Order No. 888. By raising these issues,

Enron seeks to extend federal regulation of electric energy commerce far beyond what federal law and Order No. 888 provide.

FERC's jurisdiction to order pro rata curtailments of comparable jurisdictional transmissions under Order No. 888 was never disputed at the Eighth Circuit. Instead, NSP focused on Order No. 888's self-acknowledged limitation:

> [T]he Commission does not have jurisdiction over the transmission of ... power to the bundled retail customers insofar as the transmission takes place over such transmission provider's facilities, and therefore the *pro forma* tariff does not have to be used for such transmission.

Order No. 888-A [62 Fed. Reg. 12,274 at 12,299] (footnote omitted).

Thus the Eighth Circuit's conclusion that FERC's jurisdiction does not encompass the transmission component of bundled retail service was correct. *NSP*, 176 F.3d at 1094. The Curtailment Orders never sought to expand Order No. 888's jurisdictional findings or to subject retail service to federal control. To the contrary, FERC conceded that "[t]he Commission does not regulate bundled retail sales." (App.43a.)

a. Enron End Runs Order No. 888.

Federal control over the transmission component of bundled retail service was presented to and rejected by FERC in the Order No. 888 proceedings. The Eighth Circuit (unlike Enron) recognized the "distinction between the rule-making proceedings pending before the United States Court of Appeals for the District of Columbia [Order Nos. 888 et al.] and the present petition for review in this case [of the Curtailment Orders.]" *NSP*, 176 F.3d at 1093.

> The proceedings in this petition for review relate to the proposed tariffs filed by NSP pursuant to Order No. 888. Involved are the differing interpretations of the Orders as they may affect the tariffs filed by NSP.

Id. at 1092. The timely filing of a petition for review of Order No. 888 in this case has long since passed. *See* 16 U.S.C. § 825l(requiring petition for review to be filed "within sixty days after the order of the Commission upon the application for rehearing").

Until the D.C. Circuit (and ultimately perhaps this Court) says otherwise, FERC, NSP and Enron are all bound by Order No. 888. The Curtailment Orders under review in this case were issued to implement one narrow aspect of Order No. 888 in a specific factual circumstance. The jurisdictional findings imbedded in Order No. 888 are highly relevant to the outcome of this case. "An agency's construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985) (*citing Chemical Manufacturers Assn. v. Natural Resources Defense Council, Inc.*, 470 U.S. 116, 125 (1985); *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Further, a lower court or agency order is valid and enforceable until a Court of competent jurisdiction reverses. Today Order No. 888 stands as the law of the land, although aspects of that order are under review by the D.C. Circuit. Litigants are "expected to obey that decree until it is modified or reversed, even if they have proper grounds to object to the order." *GTE Sylvania, Inc. v. Consumers Union of United States, Inc.*, 445 U.S. 375, 386 (1980).

In sum, FERC in order No. 888 did not buy Enron's jurisdictional arguments. Instead, Order No. 888 recognized that federal regulatory jurisdiction is limited. The Curtailment Orders were issued pursuant to (and, as found by the Eighth Circuit, in violation of) Order No. 888. Thus this case is not about whether FERC's jurisdiction is limited as Order No. 888 provides – it is. Instead, the issue is where (not whether) the line between State and Federal jurisdiction exists. NSP and FERC agree that federal authority over the transmission of electricity is not unbounded. The Eighth Circuit merely

recognized the boundary drawn by FERC in Order No. 888 and concluded that the Curtailment Orders crossed that line. Enron should not be allowed to leverage this narrow holding into a fundamental jurisdictional challenge.

b. Enron Failed to Preserve the Issue.

Although Enron strives mightily to disguise the true nature of its collateral attack, the argument boils down to whether FERC was wrong in the Curtailment Orders because FERC was wrong in Order No. 888 when FERC recognized it had no jurisdiction over bundled retail sales. Before the agency in this case, however, Enron (who was a party) never sought rehearing of the Curtailment Orders on that basis. Thus the jurisdictional limitation of Order No. 888 is the controlling law of the case and Enron failed to contest *to FERC* in this case Order No. 888's jurisdictional reach. The FPA requires that

> [n]o objection to the order of the Commission shall be considered by the [reviewing] court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure to do so.

16 U.S.C. § 825l(b). Despite the Curtailment Orders' disclaimer of bundled retail sales regulatory authority (which is the heart of NSP's position) (App. 43a) Enron failed to seek rehearing or state a reasonable excuse for its failure to do so. Thus, Enron's petition asks this Court to consider an argument that was never urged on administrative rehearing.

This Court is without jurisdiction to entertain such requests. *See, e.g., Cities of Campbell and Thayer v. FERC*, 770 F.2d 1180, 1183 (D.C. Cir. 1985)(filing for rehearing within 30 days of the agency order is a jurisdictional prerequisite to judicial review); *Boston Gas Co. v. FERC*, 575 F.2d 975, 977-78 (1st Cir. 1978); *see also Federal Power Comm'n v. Colorado Interstate Gas Co.*, 348 U.S. 492 (1955) (court precluded from hearing an objection to agency order where objection was not raised in administrative proceedings

as required by the statute); *Town of Norwood v. FERC*, 906 F.2d 772 (D.C. Cir. 1990) (dismissing petition for review because specific issue was not presented to FERC as required by Section 313(b) of the FPA). Enron, who neither sought rehearing of the Curtailment Orders nor properly attacked Order No. 888 in this proceeding, is barred from controverting the scope of FERC's jurisdiction before this Court.

2. There is No "Important Federal Question."

a. Supreme Court Rule 10.

Supreme Court rules and precedent do not welcome Enron's petition. Specifically, Rule 10(c) provides that certiorari may be granted when a "court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." S. Ct. Rule 10(c). But certiorari should not be granted

> except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.

Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 79 (1955) (quoting *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923)).

b. The Decision Below was Narrow.

Enron embroiders the Eighth Circuit's decision as "deny[ing] FERC a large part of its jurisdiction over the transmission in interstate commerce" or as "stri[pping] FERC of the authority to open the transmission grid fully to competition." (Pet. at 2-3; *see also* Enron Motion p. 2-3) Yet the lower court never suggested that Order No. 888 was invalid; the opinion was confined to the Curtailment Orders.

NSP, 176 F.3d at 1093. And NSP always acknowledged FERC's authority to mandate comparable treatment of jurisdictional third-party transactions. The Eighth Circuit merely confirmed this jurisdictional principle. Indeed, NSP even proposed to FERC (and FERC accepted) the requirement on NSP to redispatch[9] generation as a curtailment method for bundled retail service. FERC acknowledged "this [redispatch] procedure is reasonable and comports with the comparability requirements of the *pro forma* tariff." (App. 39a.)

Hence the only issue before the circuit court was whether bundled retail service could be interrupted by federal mandate even before other options for relieving the transmission congestion in a manner that preserved service to captive retail customers had been exhausted. Because retail load shedding has such a dramatic impact –lights out in factories, schools and homes – such a measure should be a last resort.

The FPA denied FERC regulatory authority "over facilities used in local distribution" and "any other sale" besides wholesale sales of electricity. 16 U.S.C. § 824(b). This statutory limitation creates the jurisdictional "bright line" which this Court recognized 35 years ago. *Federal Power Comm'n v. Southern Cal. Edison Co.*, 376 U.S. 205, 215 (1964) ("*Southern Cal. Edison Co.*") The Eighth Circuit's reaffirmation of FERC's self-acknowledged jurisdictional limit certainly does not contradict Supreme Court precedent or create irreconcilable conflicts among the circuits. Thus Enron's broodings about "interstate commerce" are beside the point and raise no weighty questions.

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[9] Redispatch occurs when energy output from generating station(s) on an unconstrained part of the interconnected system (with higher operating costs) is increased while output from (lower cost) station(s) contributing to the constraint is simultaneously reduced. Thus the congestion on the constrained line(s) is relieved while all customers continue to be served and the overall reliability of the system is protected.

3. The NERC TLR Proceedings and the TLR Orders

Almost immediately after the Curtailment Orders were issued, FERC embarked upon a comprehensive "generic" adjudication of curtailment protocols. These proceedings were convened to consider the inter-relationship between Order No. 888's "pro rata curtailment" requirements and the regional reliability practices adopted by NERC and its member reliability councils. FERC ultimately issued a series of clarifications, which implicitly modified several of the findings in the Curtailment Orders. Specifically the TLR Orders provided as follows:

- On Dec. 16, 1998, FERC determined regional curtailment procedures are consistent with or superior to the contract path method required in the Order No. 888 pro forma Tariff. FERC ordered all transmission utilities to use regional procedures. This was an operational departure from the requirements of the initial April 30, 1998 Curtailment Order. FERC did not, however, overrule the Curtailment Orders.

- Thereafter FERC required regional procedures to be filed with a utility's Transmission Tariff. NSP's current regional curtailment procedures were included in its Transmission Tariff in a compliance filing dated January 16, 1999. This filing was accepted by FERC.

- Most importantly, on May 12, 1999, just two days before the Eighth Circuit opinion, FERC expressly recognized the distinction between *curtailment* and *load shedding*, and specified that alternative curtailment methods should be employed prior to load shedding.[10]

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[10] This was precisely the type of clarification that NSP sought before the agency in this case, but which the June 29, 1998 and July 31, 1998 Curtailment Orders did not provide and indeed contradicted. Again FERC did not overrule the Curtailment Orders.

- A June 21, 1999, FERC order accepted regional curtailment procedures applicable to NSP's *region as* consistent with the Order No. 888 pro forma Tariff. FERC later accepted NSP's compliance filing.[11]

The TLR Orders implicitly modified on a generic basis FERC's interpretation of pro rata curtailment requirements while keeping the contrary rule of the NSP's specific Curtailment Orders in place. Once the record about these extraordinarily complex operational issues was more complete, FERC was able to fashion a regulatory strategy that protects wholesale competition while not impinging on retail reliability.[12] NSP strongly supports both the operational practices now embodied in the TLR Orders and the preservation of retail reliability policy expressed in the Eighth Circuit opinion.

Enron's and the Amici's worries about the supposed "havoc" this case will "wreak" on Order No. 888 (Pet. p. 24, *see also* Motion, pp. 2-3) simply do not withstand scrutiny. The TLR Orders and NSP's compliance filing in this case require all FERC-jurisdictional transmission providers in the Eastern Interconnection (including NSP) to implement curtailments on a pro rata basis under regional procedures which are designed to preserve reliability. The net result is

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[11] *Mid-Continent Area Power Pool*, 87 FERC ¶61,333 (1999); *see also NSP Operating Cos.*, Docket No. ER99-3465-000 (unpublished delegated letter order issued Aug. 3, 1999).

[12] The Amici's speculation (Amici Brief p. 14) about the TLR Orders being reopened if the Eighth Circuit opinion is upheld is simply that: speculation. The TLR Orders are the law now and transmission providers and FERC are "expected to obey that decree until it is modified or reversed, even if they have proper grounds to object to the order," *GTE Sylvania, Inc.*, 445 U.S. at 386. In any event, the TLR Orders are not an issue in this proceeding. Any challenge to the TLR Orders would have to proceed through the normal processes of rehearing at FERC and, if necessary, review by a court of appeal.

that regulation of transmission system management is not *broken; there is nothing* for this Court to fix.

B. Enron's Collateral Attack On Order No. 888.

According to Enron and the Amici, the appellate opinion eviscerates Order No. 888 and emasculates FERC's ability to prescribe uniform transmission rules. However, Enron not only wants to undo the Eighth Circuit's decision, its Petition seeks to obliterate Order No. 888's well-crafted jurisdictional limits as well. This is a collateral attack on Order No. 888, which should be rejected.[13]

1. Standard of Review

An agency's construction of its enabling statute is entitled to great judicial deference. *Riverside Bayview Homes*, 474 U.S. at 131 (citing *Chemical Mfrs, Ass'n*, 470 U.S. at 125). In surveying the metes and bounds of agency jurisdiction, the Court should yield "to FERC's construction if it does not violate plain meaning and is a reasonable interpretation of silence or ambiguity." *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 380-381 (1988) (Scalia, J., concurring)(*citing K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291-292 (1988)); *Chevron U.S.A., Inc*, 467 U.S. at 842-844. "[T]his rule of deference applies to an agency's interpretation of a statute designed to confine its authority." *Id.*, (*citing Japan Whaling Ass'n v. American Cetacean Society*, 473 U.S. 221, 226, 233 (1986)); *Chemical Mfrs, Ass'n*, 470 U.S. at 123, 125-26; *see also Riverside Bayview Homes*, 474 U.S. at 131.

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[13] Enron's reliance on *United States v. Munsingwear Corp.*, 340 U.S. 36 (1950) (Pet. p. 13 Motion p.3) is just a smokescreen to take another bite at the certiorari apple and to further the collateral attack on Order No. 888. As stated long ago by Chief Justice Taft, however, certiorari jurisdiction "was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing." *Magnum Co. v. Coty*, 262 U.S. 159, 163 (1923).

"In particular, it is settled law that the rule of deference applies even to an agency's interpretation of its own statutory authority or jurisdiction." *Mississippi Power & Light*, 487 U.S. at 381 (Scalia, J., concurring) (citing *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 844-845 (1986); *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 830, n. 7 (1984) ("We have never ... held that such an exception [for issues of statutory jurisdiction] exists to the normal standard of review...; indeed, we have not hesitated to defer ..."); *City of New York v. FCC*, 486 U.S. 57, 64 (1988); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 700 (1984); *CBS, Inc. v. FCC*, 453 U.S. 367, 382 (1981); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

2. Enron's Invented Regulatory Regime Has Already Been Rejected.

Enron proclaims that the Eighth Circuit started "with the erroneous premise that FERC lacks jurisdiction over interstate transmission of electricity for bundled retails sales." (Pet. at 18; *accord* Enron's Motion, p.2.) Enron would have FERC control all transmissions if a high voltage component is present. The nature of the electric service transaction, be it retail sale, wholesale point-to-point transaction, or wholesale sale would make no difference in the regulatory scheme that Enron champions. In other words the jurisdictional "bright line" would simply be erased. *See Southern Cal. Edison Co.*, 376 U.S. at 215.

Enron's argument is a non-starter because the so-called "erroneous premise" is fully consistent with the FPA's statutory mandate, Supreme Court precedent and administrative determination. Specifically, the FPA reserves to the States jurisdiction over the "local distribution" and retail sales of electricity. 16 U.S.C. §• 824(b). FERC has found the transmission of bundled retail service to constitute a component of retail sales that is beyond FERC's authority to regulate. Order No. 888, FERC Stats. and Regs., at 31,781. The FPA provides for concurrent federal and state jurisdiction

over electric utilities, with FERC controlling wholesale operations and the states overseeing retail sales.

Moreover, FERC acknowledged this dual jurisdiction and the non-federal nature of bundled retail service in the Order No. 888 rulemaking.

> [T]he Commission does not have jurisdiction over the transmission of ... power to the bundled retail customers insofar as the transmission takes place over such transmission provider's facilities, and therefore the pro forma tariff does not have to be used for such transmission.

Order No. 888-A [62 Fed. Reg. at 12,299] (footnote omitted)(emphasis added). *See Federal Trade Comm'n v. Bunte Brothers*, 312 U.S. 349, 351-52 (1941)("that for a quarter century the Commission has made no such claim is a powerful indication that effective enforcement . . . is not dependent on control over 'nonjurisdictional' transactions.") ("*Bunte*").

In sum there is no basis for recognizing the all-encompassing federal regulatory jurisdiction that Enron seeks to establish by its petition. Indeed, this precise argument was rejected by Order No. 888. In the order No. 888 rulemaking proceedings the Coalition for a Competitive Electric Market ("CCEM") (of which Enron is a member) urged federal authority over the transmission component of bundled retail electric service. CCEM argued "[t]he failure to unbundle transmission to retail customers is also squarely at odds with the Commission's decisional precedents under the Natural Gas Act." *Application of the Coalition For A Competitive Electric Market For Reconsideration And Clarification Or, In The Alternative, Rehearing*, FERC Docket No. RM95-8-001 (filed May 24, 1996). Rejecting CCEM's invitation to impose federal regulation upon direct retail sales, Order No. 888 explained FERC's jurisdictional limitations as follows:

> In response to those commenters (including NARUC) who argue that the Commission did not

> explain why its authority attaches only to unbundled, but not bundled, retail transmission in interstate commerce by public utilities, *we believe that when transmission is sold at retail as part and parcel of the delivered product called electric energy, the transaction is a sale of electric energy at retail. Under the FPA, the Commission's jurisdiction over sales of electric energy extends only to wholesale sales.* However, when a retail transaction is broken into two products that are sold separately ... we believe the jurisdictional lines change. In this situation, the state clearly retains jurisdiction over the sale of the power. However, the unbundled transmission service involves *only* the provision of "transmission in interstate commerce" which, under the FPA, is exclusively within the jurisdiction of the Commission. Therefore, when a bundled retail sale is unbundled ... the resulting transmission transaction falls within the Federal sphere of regulation.

Order No. 888, FERC Stats. and Regs. at 31,781 (emphasis added).[14]

In short, Enron's federal regulatory expansion was spurned by FERC in Order No. 888 as well as by the Eighth Circuit below. And Enron, who is a party to the Order No. 888 appeal, recognizes that the issues it is championing here belong in the D. C. Circuit. In its statement of issues, Enron identified precisely its position that FERC should have taken far broader jurisdiction over transmission access than is reflected in Order No. 888. *Transmission Access Policy Study*

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[14] This specific jurisdictional finding is on appeal in the D.C. Circuit proceedings reviewing Order No. 888. NSP is not a party to that appeal because NSP supports FERC's fundamental Order No. 888 policy decisions. Enron, on the other hand, is participating in that appeal and has attacked FERC's jurisdiction directly in that proceeding as it is attacking FERC collaterally here.

Group, et al. v. FERC, Nos. 97-1715, et al., "Issue Statement and Disclosure Statement of Intervenor Enron Power Marketing, Inc., at 2 (D.C. Cir. filed June 18, 1998). Enron's direct attacks on Order No. 888 are properly addressed in that forum not as a collateral attack here.

3. Order No. 888 Rejected the Application of NGA Precedents.

Enron continues its collateral attack upon Order No. 888 by pressing the application of two NGA cases on the interpretation of the FPA. Enron insists that *Federal Power Comm'n v. Louisiana Power & Light Co* ., 406 U.S. 621 (1972)("*LP&L*") and *Mississippi River Transmission Corp. v. FERC*, 969 F.2d 1215 (D.C. Cir. 1992)("*MRT*") should control. *LP&L* and *MRT* addressed curtailment practices in the natural gas pipeline industry. According to Enron the same legal analysis should be applied to electric transmission service under the FPA and Order No. 888.

Enron, of course, presses this same argument in its direct attack on Order No. 888 in the D.C. Circuit. But Enron concedes (Pet. p. 10-11) that FERC never cited *LP&L* and *MRT*. Contrary to Enron's criticism, however, FERC did not "shy away" from these precedents. Rather, FERC tacitly disclaimed them because Order No. 888 rejected plenary jurisdiction over bundled retail transmissions. Congress decreed in the FPA that FERC's jurisdiction "shall not apply to any other sale of electric energy" such as retail sales. 16 U.S.C. § 824(b). See *Federal Power Comm'n v. Conway Corp.*, 426 U.S. 271, 276 (1976)("*Conway*") ("[FERC] has no power to prescribe the rates for retail sales of power companies"). Obviously, Enron's lonely collateral attack, which contradicts even the agency's view below, cannot be seen as raising the type of important federal question justifying review.

FERC's more limited interpretation of its FPA jurisdiction is entirely reasonable. Unlike the FPA, the NGA invested FERC with exclusive jurisdiction over interstate gas

transportation regardless whether the traffic served retail or wholesale sales. The regulatory scope is different because gas production has historically been centralized. From the gas fields a federally regulated interstate pipeline network provides delivery to local distribution companies that are regulated by state commissions. The key to the natural gas business is getting the product to the customer bases, which in most cases are far removed from the production source. Interstate shipment was an essential part of the operation from the outset.

Electric service has far different roots, and those roots have jurisdictional significance. Unlike centralized gas collection and transportation systems, vertically integrated electric utilities started out as many "islands" of service. Numerous generation sources were located near the customer base. High voltage transmission was just the mechanism to transmit locally produced power to local customers. From the early days, retail distribution was considered local in character regardless of the voltage in the wires. Because they were *local* monopolies, state commissions regulated electric utilities. Slowly over time, these widely scattered "islands" were interconnected to form the present grid. This interconnected high-voltage delivery system ultimately gave rise to FERC jurisdiction over the wholesale transactions (sales and transmission service).

High voltage transmission began to take on the characteristics of a common carrier as power was shipped from state to state among various utilities. But right up to and including Order No. 888, bundled retail distribution service, regardless of voltage, continues to be governed by state and not federal tariffs.

> [W]e believe that when transmission is sold at retail as part and parcel of the delivered product called electric energy, the transaction is a sale of electric energy at retail. Under the FPA, the Commission's jurisdiction over sales of electric energy extends only to wholesale sales.

Order No. 888, FERC Stats and Regs at 31,781 (emphasis added).

FERC's refusal to rely upon *LP&L* implicitly acknowledges that Enron – without FERC's support - is trying to accomplish before this Court what Enron could not get in Order No. 888 – federalized regulation of all transmission, whether for wholesale or retail uses. Such litigation tactics contravene well-established law and distort the purpose of this Court's certiorari jurisdiction. FERC's interpretation of its FPA jurisdiction is entitled to judicial deference particularly when Order No. 888 is not the subject of this petition. *See Bunte*, 312 U.S. at 351-52. Enron should be told to press these arguments in the D.C. Circuit where they belong.

C. The Eighth Circuit's Opinion Follows The Relevant Precedent.

Enron conjures an alleged conflict with *Conway*, 426 U.S. 271. This illusory basis for certiorari jurisdiction is no more substantial than Enron's reliance upon *LP&L*, 406 U.S. 621.

Conway required FERC's predecessor to consider retail rates when establishing wholesale rates. This responsibility was imposed even though retail rates are not subject to federal jurisdiction. 426 U.S. at 281-82. While *Conway* addressed rate levels, by direct analogy, FERC must also consider the impact of federal transmission regulation on retail electric service reliability. As the Eighth Circuit recognized, this Court in *Conway* authorized FERC to consider non-jurisdictional matters in setting jurisdictional rates. It did not, however, authorize FERC to regulate non-jurisdictional activities. The Eighth Circuit correctly found that federally mandated load shedding would subject NSP retail customers to lower -- not comparable -- service levels than wholesale customers. The Eighth Circuit's decision, TLR Orders and the resulting compliance filings have now resolved this unacceptable situation.

Rather than creating a conflict among the circuits, the Eighth Circuit decision conformed itself to directly applicable precedent from the D.C. Circuit and elsewhere. *NSP*, 176 F.3d at 1094, citing *Altamont*, 92 F.3d at 1248. *Altamont*, like this case, holds that FERC may not encroach upon State-jurisdictional activities under the guise of regulating a FERC jurisdictional activity. 92 F.3d at 1248. This jurisdictional limitation was recently reaffirmed by the Tenth Circuit in *City of Fort Morgan v. FERC*, 181 F.3d 1155 (10th Cir. 1999)(holds that FERC overstepped jurisdictional bounds in extending authority over gas pipelines that were engaging in discrete nonjurisdictional activities); see also *American Rivers, Inc. v. FERC*, 129 F.3d 99, 111 (2d Cir. 1997)("[T]he Commission must establish that the authority it proposes is rooted in a Congressional mandate."). The Eighth Circuit's holding was perfectly in line with all of these cases.

D. The Supremacy Clause Argument Fails.

Finally, Enron raises the spectre of the Supremacy Clause. U.S. Const. Art. VI, cl. 2. But the Supremacy Clause is invoked only when there is a *conflict* between state and federal regulatory schemes. The Constitution does not , as Enron suggests, deal a trump card to be played any time federal law is implicated. See *Dalton v. Little Rock Family Planning Services*, 516 U.S. 474, 475 (1996). Claiming a conflict exists does not make it so. Thus, *Mississippi Power & Light Co.*, 487 U.S. 354 *and Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986) (Pet. p. 14) are easily distinguishable.

There is no conflict of sovereigns because the Curtailment Orders were not consistent with Order No. 888 or the subsequent TLR Orders. Supremacy Clause preemption must be narrowly tailored to avoid "running roughshod over the state interest" in matters of state concern. *Little Rock Family Planning Services*,, 516 U.S. at 476. The Eighth Circuit's decision is just such a result.

CONCLUSION

The reasons to reject Supreme Court review are legion. Statutorily established jurisdictional lines, the subsequent administrative resolution of the operational issue, and the correctness of the Eighth Circuit's decision merely head the list. Enron's Petition should be denied.

Respectfully submitted,

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